

NO. 48320-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DOUGNYL AKEANG,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth Martin, Judge

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

Page

### A. ARGUMENT IN REPLY

1. APPELLANT DID NOT WAIVE THE RIGHT TO DISMISSAL UNDER THE MANDATORY JOINDER RULE BY FAILING TO MOVE TO CONSOLIDATE THE THEFT CHARGE WITH THE POSSESSION CHARGES PRIOR TO THE FIRST TRIAL; THE RECORD DOES NOT ESTABLISH THAT HE HAD BEEN CHARGED WITH THEFT AT THAT TIME....1
2. THE MANDATORY JOINDER ARGUMENT WAS NOT WAIVED BECAUSE THE SUPERIOR COURT DID NOT HAVE JURISDICTION OVER THE THEFT CHARGE, EVEN IF IT WAS CHARGED IN MUNICIPAL COURT, TO CONSOLIDATE IT WITH OTHER CHARGES PRIOR TO THE FIRST TRIAL..3
3. WHETHER THEFT IN THE THIRD DEGREE AND POSSESSION OF A STOLEN VEHICLE ARE RELATED OFFENSES IS NOT DETERMINATIVE OF THE MANDATORY JOINDER ISSUE IN THIS CASE BECAUSE THE STATE CHOSE NOT TO RETRY THE VEHICLE CHARGE. AND THE STATE APPARENTLY CONCEDES THAT THE THEFT IS RELATED TO THE POSSESSION OF A FIREARM CHARGE.....5
4. MR. AKEANG WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO THE ADDITION OF THIRD DEGREE THEFT ON RETRIAL OF THE UNLAWFUL POSSESSION OF A FIREARM CHARGE.....7
- B. CONCLUSION.....8

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES:

<u>State v. Carter</u> , 56 Wn. App. 217, 783 P.2d 589 (1989).....	4
<u>State v. Ford</u> , 110 Wn.2d 827, 755 P.2d 806 (1988).....	3-4
<u>State v. Lee</u> , 132 Wn.2d 498, 939 P.2d 1223 (1997).....	5
<u>State v. McNeil</u> , 20 Wn. App. 527, 582 P.2d 524 (1978).....	5

### STATUTES, RULES AND OTHER AUTHORITY :

CrR 4.3.1.....	4, 5, 7, 9
RAP 9.1.....	3
RAP 9.11.....	3
RCW 3.20.010.....	3
RCW 35.20.250.....	3

**A. ARGUMENT IN REPLY**

**1. APPELLANT DID NOT WAIVE THE RIGHT TO DISMISSAL UNDER THE MANDATORY JOINDER RULE BY FAILING TO MOVE TO CONSOLIDATE THE THEFT CHARGE WITH THE POSSESSION CHARGES PRIOR TO THE FIRST TRIAL; THE RECORD DOES NOT ESTABLISH THAT HE HAD BEEN CHARGED WITH THEFT AT THAT TIME.**

The issues on appeal are: (1) whether the addition of a third degree theft charge after a first trial on related charges ended in a mistrial violated the mandatory joinder rule and (2) whether Mr. Akeang was denied effective assistance of counsel where his attorney failed to move to dismiss the third degree theft charge on mandatory joinder grounds before the retrial.<sup>1</sup> As set out in the Opening Brief of Appellant (AOB), because there was no evidence in the record that Mr. Akeang had actually been charged with third degree theft in municipal court or elsewhere, there were

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<sup>1</sup> CrR 4.3.1(b)(3) provides that “A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses has previously been denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.”

CrR 4.3.1(b)(2) provides, in relevant part, that “A defendant’s failure to so move [to consolidate] constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.” (emphasis added)

no charges to move to consolidate and a motion to dismiss the theft charge before retrial by defense counsel would have precluded Mr. Akeang from being tried on that crime. See AOB 1-2.

In its Brief of Respondent (BOR), the state argues that the mandatory joinder issue was waived because Mr. Akeang was “on notice that he had been charged with theft in the third degree in Puyallup Municipal Court” and failed to move to consolidate the theft with the unlawful possession of a firearm and possession of a stolen vehicle charges before the first trial as required by CrR 4.3.1.<sup>2</sup> Brief of Respondent (BOR) 4-6.

In support of its argument, respondent asks this Court to accept its unsupported representation, as fact, not only that the theft was charged in Puyallup Municipal Court, but that Mr. Akeang had been charged with theft prior to the first trial, that he had notice of the charge and that he was in custody for arraignment on that charge prior to the first trial. RP 4-6. Respondent concedes, however, in a footnote, that it “is not in the record from either of the two superior cases” that Mr. Akeang had actually been charged with the third degree theft in municipal court. BOR 5 note 3.

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<sup>2</sup> Respondent makes this argument under the heading, “DEFENDANT WAIVED THE ISSUE BY FAILING TO MOVE FOR JOINDER BEFORE THE SECOND TRIAL.” Brief of Respondent 4. This appears to be a mistake and that respondent meant “before the first trial.”

Respondent's concession should be determinative; there is no evidence in the record on appeal that the theft was charged in municipal court or of any other representations in respondent's brief about proceedings there. RAP 9.1 (the record on appeal consists of the verbatim report of proceedings, clerk's papers from the superior court file, and exhibits). Nor has respondent moved to supplement the record on appeal under RAP 9.11. This waiver argument should be rejected.

**2. THE MANDATORY JOINDER ARGUMENT WAS NOT WAIVED BECAUSE THE SUPERIOR COURT DID NOT HAVE JURISDICTION OVER THE THEFT CHARGE, EVEN IF IT WAS CHARGED IN MUNICIPAL COURT, TO CONSOLIDATE IT WITH OTHER CHARGES PRIOR TO THE FIRST TRIAL.**

Even if respondent had established that Mr. Akeang had been charged in Puyallup Municipal Court prior to the initial trial on the unlawful possession of a firearm and possession of a stolen vehicle charges, the superior court would not have had jurisdiction over the charge filed in municipal court to consolidate that charge with the possession charges. RCW 3.20.010 provides for concurrent jurisdiction of the municipal and superior courts over criminal misdemeanors. RCW 35.20.250 and Rules For Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) provide the mechanism by which the superior court reviews the decisions of municipal courts. State v. Ford, 110 Wn.2d 827,

829, 755 P.2d 806 (1988). Removal of a charge from municipal to superior court is not an authorized action under the RALJ rules.

Stated another way, the waiver provisions of CrR 4.3.1(b) (1) apply only to related offenses which are “within the jurisdiction. . . of the same court.” The municipal court is not “the same court.”

Thus, even if the record established that Mr. Akeang had been charged with theft in Puyallup Municipal Court at the relevant time, the superior court did not have jurisdiction to consolidate the municipal charge with the superior court charges.

Given that the theft was not within the jurisdiction of the superior court, the failure to move to consolidate did not waive a timely motion to dismiss on mandatory joinder grounds after trial on a related charge. There is no waiver of the right to seek dismissal of an offense charged after a first trial where there was no opportunity to seek consolidation. CrR 4.3.1(b) (1); State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989) (no opportunity to move to consolidate because the state added the charge after mistrial).

The state chose to “refer” the theft charge to the Puyallup Municipal Court, and not bring Mr. Akeang to trial on that charge along with the felony charges. RP 5. The mandatory joinder rules do not permit holding back charges to hedge against the risk of an

!“unsympathetic jury at the first trial.” State v. McNeil, 20 Wn. App. 527, 532, 582 P.2d 524 (1978)

**3. WHETHER THEFT IN THE THIRD DEGREE AND POSSESSION OF A STOLEN VEHICLE ARE RELATED OFFENSES IS NOT DETERMINATIVE OF THE MANDATORY JOINDER ISSUE IN THIS CASE BECAUSE THE STATE CHOSE NOT TO RETRY THE VEHICLE CHARGE. AND THE STATE APPARENTLY CONCEDES THAT THE THEFT IS RELATED TO THE POSSESSION OF A FIREARM CHARGE.**

Respondent argues at length that joinder was not required because, it asserts, theft in the third degree is not a related offense of possession of a stolen vehicle. BOR 6-10. Whether theft in the third degree was a related offense to the possession of a stolen vehicle offense, however, is not determinative of the mandatory joinder issue. When the third degree theft charge was added before the retrial, the possession of a stolen vehicle charge was deleted. IRP 99-100; CP 43-44. Because respondent never argues in its Brief of Respondent that the theft charge was not related to the unlawful possession of a firearm charge, respondent implicitly concedes that it is. The firearm charge is the charge that the theft charge was joined with on retrial; it is the relevant related charge.

In any event, as set out in the Opening Brief of Appellant, 7-9, all three crimes are related. See State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Offenses are “related” under the rule “if they are within the



jurisdiction and venue of the same court and are based on the same conduct.” CrR 4.3.1 (b) (1); Id. “Same conduct” is conduct involving “a single criminal incident or episode.” Id. at 503. “ Examples of “same conduct” include:

offenses based upon the same physical act or omission or same series of physical acts. Close temporal or geographic proximity of the offenses will often be present; however, a series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days.

Id. at 503-504. Here, the charges grew out of one episode -- Mr. Akeang was stopped in the car which contained the firearm and the allegedly stolen alcohol as well. The prosecutor, in fact, argued that evidence of all of the potential conduct -- particularly the theft of alcohol -- should have been admissible at the first trial because the conduct was part of the res gestae, or episode, of the crime. 1RP 55-57. The court excluded the evidence of the alleged theft finding that it was relevant, but too prejudicial to be admitted. RP 61, 64. The offenses were related. As respondent apparently concedes, at the least, the unlawful possession of a firearm and theft charges were related and that is sufficient to require dismissal under the mandatory joinder rule.

**4. MR. AKEANG WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO THE ADDITION OF THIRD DEGREE THEFT ON RETRIAL OF THE UNLAWFUL POSSESSION OF A FIREARM CHARGE.**

Mr. Akeang's argument on appeal is that he was denied the effective assistance of counsel guaranteed by the state and federal constitutions because his third degree theft charge would have been dismissed prior to trial had counsel properly moved for dismissal under the mandatory joinder rule. AOB 11-13. Defense counsel did object on other grounds to adding the third degree theft charge after the first trial ended in a mistrial -- he indicated he would "see if [he] could come up with some law on that." 1RP 99. Clearly counsel had no strategic reasons not to object on mandatory joinder grounds. 1RP 99-100. The failure to object on proper grounds constituted deficient performance, and Mr. Akeang was obviously prejudiced by the deficient performance. Had counsel objected, the theft charge would have been dismissed.

Respondent's argument is that Mr. Akeang would have lost the mandatory joinder motion because the theft charge was not related to the stolen vehicle charge, BOR 11-12, and that the decision not to move to

dismiss was strategic because “the best course of action for his client was not to join the cases” or “ in the interest of judicial economy where the misdemeanor would run concurrently to any felony conviction” or “to achieve a global settlement of all cases.” ROB 11-12.

Respondent’s argument fails because, at the least, the possession of a firearm charge and the theft charges were related and that relatedness was sufficient to require dismissal. It fails because there was no strategic reason, judicial economy or possibility of global settlement in not moving to dismiss the theft charge. Counsel did move to dismiss, just not on proper grounds.

While Mr. Akeang did not get convicted of any felony charge; he did get convicted of the misdemeanor theft. Had he prevailed on the mandatory joinder motion, he would have had no convictions – a better result. He was prejudiced by the failure to move on mandatory joinder grounds.\.

## **B. CONCLUSION**

Appellant respectfully submits that his third degree theft

conviction should be reversed and dismissed with prejudice.

DATED this 17th day of August, 2016.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_

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CERTIFICATE OF SERVICE

I certify that on the 17th of August , 2016, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following by e-mail

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# GRIFFITH LAW OFFICE

**August 16, 2016 - 8:28 PM**

## Transmittal Letter

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